STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2006
v	No. 258824 Oakland Circuit Court
DAVID GARCIA, Defendant-Appellant.	LC Nos. 2003-190528-FH; 2003-192300-FH

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant was charged in two separate cases with burning real property, MCL 750.73, and arson of a dwelling house, MCL 750.72. The cases were consolidated for trial and a jury convicted defendant of both charges. Defendant was sentenced to concurrent prison terms of five to ten years for the burning real property conviction, and five to twenty years for the arson of a dwelling house conviction. He appeals as of right. We affirm.

I

Ten building fires occurred in defendant's neighborhood between November 2002 and April 2003. The fires were deliberately set by a person who poured a flammable liquid and ignited it with a flame. Defendant's son pleaded no contest to a criminal charge involving the first eight incidents and was sentenced to a prison term.

The last two fires occurred after defendant's son was incarcerated. On February 25, 2003, a fire destroyed the home of the Winiewicz family, who lived across the street from defendant's home. Two of the first eight arson incidents also occurred at the Winiewicz home. The Winiewiczes had not yet returned to their home when it was burned the third time, and no one was in the home when the third fire was set. On April 11, 2003, a nearby apartment building burned to the ground. The building was unoccupied when it was burned.

Defendant was charged with arson of a dwelling place for the February 25 fire and burning real property for the April 11 fire. The prosecutor theorized that defendant set the fires as part of a scheme to deflect suspicion away from defendant's son's alleged involvement in setting the earlier fires. At trial, several police officers testified that defendant confronted them at the scene of the February 25 fire and accused them of falsely blaming his son for the earlier

fires. Two acquaintances of defendant testified that defendant told them that the police would have to release his son if the fires continued after his son was incarcerated.

After both the February 25 and April 11 fires, a trailing dog traced defendant's scent from the locations of the fires to defendant's home. The police found wet tennis shoes, a t-shirt that tested positive for the presence of gasoline, and a charcoal lighter in defendant's car after the February 25 fire. Defendant subsequently gave false information when Detective Frank Mostek questioned him about his activities immediately before the February 25 fire.

II

Defendant argues that the trial court erred by granting the prosecutor's motion to consolidate the two charges for trial. Defendant preserved this issue by objecting to consolidation. This Court reviews de novo the issue whether offenses are related as a matter of law and, thus, eligible for joinder. *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977).

MCR 6.120(B) provides:

> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

Defendant's reliance on *Tobey*, *supra*, and *People v Daughenbaugh*, 193 Mich App 506, 510; 484 NW2d 690 (1992), mod 441 Mich 867 (1992), in support of his argument that severance was required under MCR 6.120(B) is misplaced because those cases are factually distinguishable. In *Tobey*, our Supreme Court held that two narcotics sales to the same undercover officer twelve days apart were distinct acts entitling the defendant to separate trials. *Id.* at 152. In *Daughenbaugh*, this Court held that a defendant was entitled to separate trials for two of four similar, but distinct robberies. *Id.* at 510. Unlike this case, the defendants in *Tobey* and *Daughenbaugh* were not alleged to have committed the offenses in furtherance of a common scheme. Here, defendant was charged with starting both fires as part of a single scheme to deflect suspicion away from his son's alleged involvement in setting the earlier fires. The offenses were therefore related for purposes of MCR 6.120(B), and the trial court did not err in joining them for trial.

III

Defendant argues that trial counsel was ineffective for failing to object to Officer Burt Crawford's testimony regarding his investigation with the trailing dog. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was deficient and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the

attorney was exercising sound strategy. *Id.* Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant argues that the prosecutor failed to lay an adequate foundation for Crawford's testimony. Before tracking dog evidence can be admitted, the prosecutor must show that the handler was qualified to use the dog, that the dog was trained and accurate in tracking humans, that the dog was placed on the trail where the alleged guilty party was said to have been, and that the trail had not become so stale or contaminated that it was beyond the dog's competency to follow it. *People v Laidlaw*, 169 Mich App 84, 93; 425 NW2d 738 (1988); *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972). Defendant argues that the final requirement was not satisfied with respect to the April 11 apartment fire, because several persons had been present at the scene to clear debris left by the fire. He cites Crawford's testimony that the fire scene "was probably as big a mess as I've seen," and that "everything was pretty well cleared and there had been a lot of traffic in and out."

At trial, however, Crawford testified that Cassie is not a tracking dog, which is trained to detect a person's path from crushed vegetation, but rather is a trailing dog, which is trained to follow a person's scent. Although workers' activity at the site would interfere with a tracking dog's ability to detect a path from crushed vegetation, Crawford testified that Cassie was able to detect a particular individual's scent across an area where other persons had passed through, so the presence of other workers would not necessarily contaminate the trail.

In *People v King*, 215 Mich App 301, 305; 544 NW2d 765 (1996), this Court held that the fact that police officers had been in a search area before a dog was given access to the area was relevant to the weight of the evidence but not its admissibility. The Court explained that the prosecutor "was not required to show that the trail was fresh and uncontaminated, but rather that 'the trail had not become so stale or contaminated as to be beyond the dog's competency to follow it.' " *Id.*, quoting *Harper, supra* at 508.

Here, the mere presence of workers in the area did not, by itself, establish that the trail was so contaminated that Cassie could no longer follow it. The record shows only that other persons were present at the scene, which is not a sufficient basis for excluding the testimony, especially in light of Crawford's testimony that Cassie was able detect a particular individual's scent across an area where other persons had passed through. Therefore, defense counsel's failure to object to the testimony does not establish ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Furthermore, defendant has not overcome the presumption that defense counsel did not object to the testimony as a matter of strategy. *Carbin, supra*. Defense counsel might reasonably have hoped to weaken the prosecution's case by undermining the trailing dog evidence. Mostek testified that the Waterford Police Department did not use its own dog because the dog handler did not believe the dog could trace a scent where there had been smoke and other persons passing through. In his cross-examination of Crawford, defense counsel inquired whether "the process of fighting the fire and the smoke itself from the fire can inhibit or mask any scent of a possible suspect?" Crawford replied that it did not, and explained that he conducted an experiment in which Cassie followed a person's scent across a patch of ground that

was burned with diesel fuel. He also stated that he had done other experiments at fire scenes which showed that smoke did not inhibit scent. Although Crawford's response might have thwarted defense counsel's strategy, the fact that a strategy does not succeed does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

IV

Defendant argues that the prosecutor improperly called a rebuttal witness to contradict a statement that defendant made in response to cross-examination. Defendant failed to preserve this issue with a timely objection to the rebuttal testimony at trial. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2002). Therefore, we review the issue for plain error affecting defendant's substantial rights. Defendant must establish: (1) that an error occurred, (2) that the error was plain, i.e., clear or obvious, and (3) that the error affected substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To establish that a plain error affected the defendant's substantial rights, the defendant must show prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* at 356. Defendant alternatively argues that defense counsel was ineffective for failing to object to the rebuttal testimony.

Tom McClusky, a prosecution witness, testified that defendant told him that he had a "device" for eavesdropping on police officers' conversations. On direct examination, defendant explained why he wanted to hear what the police were saying. He testified as follows:

> *Q*. There was some testimony that apparently you said that you were listening to the police or trying to see where they were. . . . Is that true? Were you ever listening to the police?
>
> *A*. I was listening. Mr. Mostek told me what was going on, he told me he had people living, staying at the house behind me, had me followed and stuff.
>
> *Q*. All right. So did you ever have any listening devices to try and track the police -
>
> *A*. No.
>
> *Q*. -- or listen to where they were?
>
> *A*. No.

On cross-examination, defendant testified as follows:

> *Q*. What else did he [Mostek] tell you? He told you about the investigation, about somebody staying -
>
> *A*. He told me that, he told me that he had people watching me, he had people staying behind the house, behind me.
>
> * * *

Q. So he's giving you all the secrets to his investigation, about having officers hiding in these houses?

A. Yup.

Q. And he told you about that?

A. Yes, he did. How else would I find out?

After the defense rested, the prosecutor called Mostek as a rebuttal witness. Mostek denied telling defendant that there were officers watching him from nearby houses.

The test of whether rebuttal evidence was properly admitted is "whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). In *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991), this Court stated:

> Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut. A prosecutor cannot elicit a denial during the cross-examination of a defense witness and use such denial to inject a new issue into the case. Cross-examination cannot be used to revive a right to introduce evidence that could have been, but was not, introduced in the prosecutor's case in chief. [Citations omitted.]

The question whether rebuttal evidence is proper depends on what proofs the defendant introduced and not merely what the defendant testified about on cross-examination. *Figgures, supra* at 399.

Defendant argues that he testified on direct examination that Mostek told him that Mostek had "people" watching him from nearby houses and that it was only on cross-examination that he indicated that Mostek told him there were "officers" in the houses. Considered in context, however, defendant's direct examination testimony about Mostek's "people" was a reference to police officers. When defendant testified that Mostek told him he "had people living, staying at the house behind me, had me followed and stuff," he was responding to a question about why he was listening to the police and trying to see where they were. Moreover, the defense theory was that Mostek unfairly focused on defendant and his son when he should have been looking for the "real" perpetrator. Defendant testified that he was mad at Mostek "because, to me, he seemed like he was, instead of going out and finding the real person who started the fire, he just stayed on, on me, asked me questions all the time and stuff." Mostek's rebuttal testimony properly responded to a theory raised by defendant on direct examination.

Although members of a homeowners association used a surveillance camera to monitor defendant's house, this does not establish that defendant meant that Mostek enlisted civilians to surveil him. The fact of civilian involvement in the investigation does not support defendant's claim of improper rebuttal testimony in these circumstances. Accordingly, defendant has not

shown that the admission of the testimony was plain error affecting his substantial rights or that defense counsel was ineffective for failing to object to the testimony.

V

Defendant argues that the trial court erroneously scored ten points for offensive variable (OV) 9 of the sentencing guidelines. Because defendant did not object to the scoring of OV 9 at sentencing or in an appropriate post-sentencing motion, we review this unpreserved issue for plain error affecting defendant's substantial rights. MCR 6.429(C); MCL 769.34(10); *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant also argues that defense counsel was ineffective for failing to object.

A trial court's scoring decision will be upheld if there is any evidence in the record to support it and the trial court's factual findings are not clearly erroneous. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). MCL 777.39(1)(c) provides that ten points shall be scored for OV 9 when there are two to nine victims. The statute requires the sentencing court to "[c]ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a).

Defendant argues that ten points were improper because no one was present in the buildings that burned. The Winiewiczes were not home when the fire occurred on February 25, 2003. However, Officer Michael Oliver testified that at least two fire trucks and other volunteers responded to the February 25 fire. He also testified that the fire consumed the entire structure, and that the flames were so hot that they caused the roof to cave in. This testimony supported a finding that defendant endangered the lives of at least two firefighters. Accordingly, we find neither plain error affecting defendant's substantial rights nor ineffective assistance of counsel.

Defendant also argues that the trial court's scoring of OV 9 was improperly based on facts not found by the jury, in violation of *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In these cases, the United States Supreme Court held that a sentencing court may not enhance a defendant's maximum sentence based on facts not found by a jury. The Supreme Court determined that such sentencing schemes violate a defendant's Sixth Amendment right to a jury trial. However, our Supreme Court stated in *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004), that the decisions in *Blakely* and *Apprendi* do not apply to Michigan's indeterminate sentencing scheme. Defendant argues that *Claypool* is no longer valid law following the United States Supreme Court's subsequent holding in *Booker, supra*. However, *Booker* involved a federal determinate sentencing scheme like the one addressed in *Blakely*. Although our Supreme Court has granted leave to appeal to reconsider this issue, see *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005), at present, *Claypool, supra,* remains controlling. Therefore, we reject this claim of error.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter